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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. ~~1340~~ and ~~1371.~~ 78 88

CHICAGO & SOUTHERN AIR LINES, INC.,

and

CIVIL AERONAUTICS BOARD, *Petitioners,*

v.

WATERMAN STEAMSHIP CORPORATION, *Respondent.*

On Petitions for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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issued by the Civil Aeronautics Board and approved by the President of the United States pursuant to the provisions of Section 801 of the Civil Aeronautics Act[1] is subject to judicial review. The Petitioner, Chicago & Southern Air Lines, Inc., also attempts to raise the question of whether, under the provisions of Section 1006 of the Civil Aeronautics Act,[2] a petition to review a decision of the Civil Aeronautics Board must be filed within sixty days after the entry of an order, when no stay thereof is obtained.

THE STATUTE INVOLVED.

The relevant sections of the Civil Aeronautics Act of 1938, as amended,[3] are set forth in the Appendix, *infra*, pages 15 to 17.

STATEMENT OF THE CASE.

This appeal concerns an opinion and several orders of the Civil Aeronautics Board in a proceeding before the Board concerning applications filed by various parties for certificates of public convenience and necessity to engage in the conduct of air transportation in overseas and foreign commerce. The Respondent herein, Waterman Steamship Corporation, was one of the applicants in this proceeding for a certificate of public convenience and necessity under Section 401 of the Act[4] to engage in air transportation between the United States and Puerto Rico. (R. 42, 95, 96.) Petitioner, Chicago & Southern Air Lines, Inc., was also an applicant for a route between New Orleans and San Juan. However, it sought much broader authorizations and included requests for routes in the Caribbean area generally and also in Central and South American areas. (R. 3-4, 232) There were many other applicants for services in this

[1] 52 Stat. 1014, 54 Stat. 1233 (49 U. S. C. 601).

[2] 52 Stat. 1024, 54 Stat. 1235 (49 U. S. C. 646).

[3] Act of June 23, 1938, C. 601, 52 Stat. 977, 54 Stat. 1233, 54 Stat. 1235) 49 U. S. C. 401 et seq.), referred to as the "Act."

[4] 52 Stat. 987, 54 Stat. 1235 (49 U. S. C. 481).

general area. All of these applications were consolidated by the Civil Aeronautics Board into one proceeding under Docket No. 525 et al., and entitled "Additional Service to Latin America." (R. 118) Hearings were held in the consolidated proceeding in 1944 and, on May 17, 1946, the Board handed down its opinion. (R. 124). In its opinion and orders, the Board granted to the Petitioner, Chicago & Southern Air Lines, Inc., a certificate of public convenience and necessity authorizing it to engage in overseas and foreign air transportation of persons, property, and mail between the co-terminal points New Orleans, Louisiana, and Houston, Texas, and San Juan, Puerto Rico, via various intermediate points. The certificate also authorized service to Caracas, Venezuela, via intermediate points. By its same opinion and orders, the application of Respondent, Waterman Steamship Corporation, was denied.

In accordance with the Board's interpretation of Section 801 of the Act,[5] its decision was then referred to the President of the United States, and on May 22, 1946, the President approved the order of the Board granting a certificate to the Petitioner, Chicago & Southern Air Lines, Inc., and denying the application of the Respondent, Waterman Steamship Corporation. (R. 256) The decision of the Board, as approved by the President, was served upon the parties on May 24, 1946.

The Rules of Practice of the Board provide, with respect to re-hearing, re-argument, or re-consideration of any final order of the Board, that:

> "Such petition for re-hearing, re-argument, or re-consideration must be filed within thirty days after service of the order sought to be vacated or modified." (R. 343)

On June 24, 1946, Respondent, Waterman Steamship Corporation, filed its formal request for a re-hearing. (R. 290) This application for a re-hearing was denied by order of the Board on July 12, 1946. (R. 328)

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[5] Note 1, supra.

Section 1006(a) of the Act[6] provides that:

> " . . . Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

Within a period of sixty days of the final order of the Board with respect to the application of Waterman Steamship Corporation, namely, the order of the Board denying its petition for re-hearing dated July 12, 1946, the Respondent filed its petition for review in the United States Circuit Court of Appeals for the Fifth Circuit. The petition for review was filed September 6, 1946, (R. 1-10).

Upon the filing of Respondent's petition for review, the Civil Aeronautics Board filed a motion to dismiss in the court below for lack of jurisdiction or, in the alternative, to affirm (R. 27). Petitioner, Chicago & Southern Air Lines, Inc., intervened and filed a similar motion (R. 360, 388).

The court below denied the motions to dismiss, holding that it had jurisdiction to review under Section 1006(a) of the Civil Aeronautics Act[7] (R. 412).

It is stated by the Petitioners that this decision of the court below is in conflict with a decision of the United States Circuit Court of Appeals for the Second Circuit in *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810, on the general question of the power of a court

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[6] Note 2, supra.

[7] Note 2, supra.

to review an order of the Civil Aeronautics Board that has been approved by the President.

It is not contended that there is any conflict in the courts below with respect to the question raised by the Petitioner, Chicago & Southern Air Lines, Inc., as to whether the Respondent's petition for review filed below on September 6, 1946, was within the sixty-day period prescribed by Section 1006 of the Act.

SUMMARY OF ARGUMENT.

I.

The question of whether the Respondent's petition for review was filed within the sixty-day period prescribed by the Civil Aeronautics Act is not a substantial question of general importance that should be reviewed by this court, and is not a question upon which there is a conflict of decision in the lower courts.

II.

The power of this court to act on petitions for writs of certiorari is purely discretionary and should not be exercised in this case.

ARGUMENT.

I.

The Question of Whether the Respondent's Petition for Review Was Filed Within the Sixty-Day Period Prescribed by the Civil Aeronautics Act Is Not a Substantial Question of General Importance that Should Be Settled by this Court, and Is Not a Question Upon Which There is a Conflict of Decisions in the Lower Courts.

The question which the Petitioner, Chicago & Southern Air Lines, Inc., alone wishes to raise concerns the timeliness of the filing of Respondent's petition for review in

the United States Circuit Court of Appeals, Fifth Circuit. The Petitioner, Chicago & Southern Air Lines, Inc., contends that the petition for review filed on September 6, 1946, was not filed within the sixty days prescribed by Section 1006 of the Civil Aeronautics Act. It contends that the petition for review should have been filed within sixty days of the initial order of the Board denying Waterman's application which was served on May 24, 1946. Chicago & Southern Air Lines, Inc., recognizes that Waterman filed a request for a re-hearing with the Board on June 24, 1946, which was not denied until July 12, 1946. Therefore, there was no final order of the Board to appeal from until the Board's order of July 12, 1946, denying Waterman's petition for re-hearing. However, Chicago & Southern Air Lines, Inc., contests this proposition on the grounds that Waterman did not request and obtain an order of the Board staying the effective date of the initial order of denial.

This question is of a very minor procedural nature and is certainly not one which might be termed a substantial question of general importance that would warrant this Court's consideration and decision.

This contention on the part of Petitioner, Chicago & Southern Air Lines, Inc., in the court below was summarily dismissed by that court as one not warranting serious consideration or discussion. (R. 409)

Furthermore, this procedural matter has not been the subject of conflicting decisions in the courts below. To the contrary, all the decisions found on this point clearly support the decision of the Fifth Circuit Court.

This precise question was raised in *Braniff Airways, Inc.* v. *Civil Aeronautics Board* (Essair Inc., Intervenor) 147 F. 2d 152 (App. Ct., D. C. 1945) where the court discarded an identical contention. There is no principle of administrative law that is better settled than the rule that no review may be had until administrative remedies have been exhausted. The final order of the Board was its order denying Waterman's Petition for Rehearing.

It is well settled, under the decisions of the courts, that no stay was necessary since the appeal period was suspended until the Petition for Rehearing was denied. *Saginaw Broadcasting Co. v. Federal Communications Commission*, 96 F. 2d 554, 558 (App. Ct. D. C. 1938).

As the court said in the *Braniff Airways* case (p. 153):

> "Essair contends that the order was not stayed, and that it was therefore necessary to file the petition within sixty days of the date of the order. But we cannot review an order until administrative remedies have been exhausted. For purposes of review, therefore there was no final order until the rehearing was denied. (Citing case.) It follows that the present petition was timely."

II.

The Power of this Court to Act on Petitions for Writs of Certiorari is Discretionary and Should Not Be Exercised in This Case.

The judgment of this court with respect to the granting of petitions for writs of certiorari is a matter of discretion. 28 U.S.C.A. 347. *American Construction Company v. Jacksonville, etc., Railroad Company*, 148 U. S. 372 (1893).

It has also been held that this power is one to be exercised sparingly and only in cases of peculiar gravity or general importance. *American Construction Company v. Jacksonville, etc., Railroad Company* (*supra*). See also *Forsyth v. Hammond*, 166 U. S. 506 (1897).

It is submitted that the issues presented by the instant case are not of peculiar gravity or general importance. Moreover, the law is clear that the court below acted in accordance with the clear and unmistakable provisions of Section 1006 of the Civil Aeronautics Act in assuming jurisdiction of the case and denying the motions of the Petitioners to dismiss the appeal below.

Section 1006(a) of the Act quoted above expressly provides that *any* order issued by the Board, *except* any order in respect of any *foreign air carrier*, shall be subject to

review. An examination of the whole Act shows that there is a distinctive difference made between foreign air carriers and air carriers. Air carriers are defined as citizens of the United States, and conversely foreign air carriers are persons not citizens of the United States. The Act contains two separate and distinct sections which establish the procedure whereby such different types of air carriers may receive authorization to engage in operation. Section 401 of the Act[8] provides for the issuance of certificates of public convenience and necessity to air carriers (that is, citizens of the United States), and Section 402 of the Act[9] provides for the issuance of permits to foreign air carriers (that is, citizens of another state). The intention of Congress to consider all domestic air carriers, whether engaged in interstate or foreign air transportation, in one category, and to consider foreign air carriers in a separate category, is thus clearly demonstrated by the fact that the authority of the Board to issue certificates to domestic carriers to engage in either interstate or foreign air transportation is contained in a single, separate section of the Act and is conditioned upon proof of identical facts, whereas the Board's authority to issue permits to foreign air carriers is contained in a wholly separate and distinct section of the Act and is governed by different standards.

As noted above, the Congress provided two entirely different standards for the issuance of these different classes of authorizations. There is sound reason for this differentiation. The issuance of a certificate to an air carrier usually results in the payment of large sums from the public treasury in the form of compensation for the transportation of mail. The procedure for determining the rates to be fixed for such transportation is established by Section 406 of the Act.[10] The Congress established one standard for the fixing of mail rates for domestic air carriers, and

[8] Note 4, supra.

[9] 52 Stat. 991, 54 Stat. 1235 (49 U. S. C. sec. 482).

[10] 52 Stat. 994, 54 Stat. 735, 54 Stat. 1235 (U. S. C. 485).

an entirely different procedure and standards for the payment of compensation to foreign air carriers for the transportation of mail.

On the interpretation of Section 1006 of the Act,[11] the court below had this to say:

> "All * * * orders are reviewable with one exception—an order in respect of a foreign air carrier subject to approval of the President as provided in Section 801. The words are too plain to be misunderstood. If Congress had intended to except all orders made subject to presidential approval by Section 801, fewer words would have sufficed. * * * Since no foreign air carrier is here concerned and no order has been made concerning such a carrier, the one exception Congress has made does not apply." (R. 410)

The argument of Petitioners is that the Congress, by subjecting to the approval of the President certificates issued to air carriers and involving overseas or foreign air transportation, provided no judicial restraint upon the obtaining of such certificates by misrepresentation and fraud. These elements could not be present with respect to permits granted by the Board to foreign air carriers.

The case at bar provides an example of imposition upon the Board and the President which a court cannot fully perceive except upon a review of the whole record. For example, as Respondent has shown in its Answer filed below, (R. 360) to the motion of Chicago & Southern Air Lines, Inc., to withhold certification and filing of record, Chicago & Southern Air Lines, Inc., represented to the Board in the hearing upon its application in Docket 525, et al., that its estimated earnings on the New Orleans-San Juan route, before mail pay, would amount to $435,000 and that the cost of operating DC-4 equipment on such route would amount to 117.92 cents per mile (R. 365). The President of Chicago & Southern Air Lines, Inc., testified that on the basis of these estimates his Company would be will-

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[11] Note 2, supra.

ing to undertake the proposed operation at a mail rate it was then receiving in its domestic services, namely, 60 cents per ton mile (R. 365).

After it obtained the certificate, and long before any service was commenced on the route, Chicago & Southern Air Lines, Inc., filed a petition with the Board in which the President of the company stated, again under oath, that on the basis of one round trip daily with DC-4 equipment between New Orleans and Havana, the cost of operation would amount —not to 117.92 cents per mile—but would total 286.88 cents per mile (R. 368).

In that petition, it is asserted that Chicago & Southern Air Lines, Inc., instead of earning $435,000 per year, before mail pay, requires the payment of $1.73 per plane mile, or approximately $416,000 per year for the operation of only the New Orleans-Havana segment of the route.

To say that the Courts have no power to review the action of the orders of the Board in this case, is to deny to the other applicants the hearing required by law. It may result, and in many instances has resulted, in the issuance of certificates to applicants whose estimates are not those of prudent businessmen, willing to invest their own funds in the enterprise, but to those who submit the most flagrant misrepresentations as to those factors involved in a determination of fitness, willingness, and ability.

Nor may it be successfully contended that the decision of the court below is in conflict with the settled principles of law as announced by other federal courts and the Supreme Court itself. It is true that there is a conflict between the opinion of the United States Circuit Court of Appeals for the Second Circuit in *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810. However, as the opinion of the United States Circuit Court of Appeals for the Fifth Circuit in the instant case points out, the opinion of the Second Circuit Court was not in accord with the settled principles of the law of judicial review of administrative and executive action; and was not supported by the de-

cisions of this court or other federal courts. On that point, the court below said:

> "We are aware that this question was decided otherwise in Pan American Airways Co. v. Civil Aeronautics Board, 121 F. 2d 810. The court there leaned upon United States v. Bush, 310 U. S. 371. We think the Bush case does not apply." (R. 411)

The petition for review filed by Waterman below attacked the *legality* of the Board's orders issuing a certificate of public convenience and necessity to Chicago & Southern and denying Waterman's application. The fundamental question in this case is not the abstract problem of the scope of the judicial power over the executive, but the fundamental question of whether administrative and executive powers have been carried out in accordance with the laws of Congress which created them. There is no conflict in the decisions of the lower federal courts or the Supreme Court upon this question. It has been universally held that the courts always have the power to review the legality of the exercise of any administrative or executive power created by the laws of Congress.

State of Wyoming v. *Franke*, 58 Fed. Supp. 890 (1945)
David L. Moss Co. v. *United States*, 103 F. (2d) 395 (1939)
Carl Zeiss, Inc. v. *United States*, 76 F. (2d) 412 (1935)
William A. Foster & Co., Inc. v. *U. S.* (1932) 20 Ct. Cust. & Pat. App. 15
U. S. v. *Fox River Butter Co.* (1932) 20 Ct. Cust. & Pat. App. 38

See also *United States* v. *Abilene & Sou. Ry. Co.*, 265 U. S. 274 (1924); *Shields* v. *Utah Idaho Cent. R. R. Co.*, 305 U. S. 177 (1938).

As the court said in *David L. Moss Co.* v. *United States* (*supra*):

> "There can be no question but that courts must exercise the judicial power vested in them to determine the legal validity of administrative action, where the validity of such action is involved in questions properly before them, whether they have been granted the right of review over action of the administrative agency or not. The duty necessarily arises because of their obligation to decide cases before them according to law. See Shields v. Utah Idaho Cent. R. R. Co., 305 U. S. 177, 59 S. Ct. 160, 83 L. Ed. —, Crowell v. Benson, 285 U. S. 22, 58, 59, 52 S. Ct. 285, 76 L. Ed. 598; United States v. Passavant, 169 U. S. 16, 18 S. Ct. 219, 42 L. Ed. 644; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 641, 26 L. Ed. 875; United States v. Haviland & Co., 2 Cir., 177 F. 175. * * * ."

The attempt of the Petitioners to inject constitutional issues in this case is without merit. Under recent decisions of this court, there can be no doubt but what this proceeding involves a "case or controversy" within the meaning of that phrase in Section 2 of Article 3 of the Constitution of the United States. It is now recognized that the fact that the court of review may not have the power to enforce its orders on the administrative body is immaterial. *Federal Power Commission* v. *Pacific Power and Light Company et al.*, 307 U. S. 156 (1939). In disposing of the contention of Petitioners that possible futility removed jurisdiction, the court below said:

> "The certificates and permits here involved are issued or denied on the orders of the Board. The President cannot make any order, though under Section 801 he can frustrate some of them. * * * The Act clearly defines the function of court and President. Each may be expected to respect the function of the other. Nor is there such prospect of futility as ought to deter the court. Courts try criminal cases notwithstanding an executive pardon may frustrate a conviction. They constantly reach conclusions in all kinds of cases undeterred by the chance that a higher court may disapprove their orders." (R. 412)

The determinative question on this point is whether there is a legal issue clearly drawn to be decided between the parties. As this court said in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266 (1933):

> "When on the appeal, as here provided, the parties come before the court of appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power." (p. 278)

The attempt to suggest that this case involves the constitutional prerogatives of the President to deal in the matters of the foreign affairs of the United States is equally without merit. This case does not involve the foreign relations of the United States. Section 401 of the Act concerns merely the licensing power to engage in the foreign commerce of the United States. It has always been recognized under the Constitution that the power to regulate the foreign commerce of the United States is vested in Congress and is not one of the exclusive constitutional attributes of the office of the Chief Executive.

For example, in the Merchant Marine Act of 1936,[12] Congress has placed in the United States Maritime Commission powers very similar to the certification provisions of the Civil Aeronautics Act, with no provision for Presidential review or sanction. Subchapter VI of the Act[13] relates to the granting by the United States Maritime Commission of operating-differential subsidy contracts to engage in the foreign commerce of the United States. Such contracts are similar in their overall effect to the certificates of public convenience and necessity issued by the Civil Aeronautics Board authorizing foreign air transportation. The pro-

[12] 49 Stat. 1985, ch. 858, approved June 249, 1936 (U. S. C. Title 49, sec. 1101).

[13] 49 Stat. 2001 et seq. (U. S. C. Title 46, sec. 1171 et seq.).

visions of the Merchant Marine Act contemplate the execution of a contract between the Commission and the carrier whereby certain services shall be rendered by the carrier on a specified route or routes in the foreign commerce of the United States. Section 603(a) of the Act[14] provides as follows:

> "If the Commission approves the application, it may enter into a contract with the applicant for the payment of an operating-differential subsidy determined in accordance with the provisions of subsection (b) of this section for the operation of such vessel or vessels in such service, route, or line for a period not exceeding twenty years, and subject to such reasonable terms and conditions, consistent with this Chapter, as the Commission shall require to effectuate the purposes and policy of this Chapter including a performance bond with approved sureties, if such bond is required by the Commission."

The Act contains no provision for Presidential approval or review of the orders of the Commission in these matters.

CONCLUSION.

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this court, and that the petition for a writ of certiorari should be denied.

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June 5, 1947.
Washington, D. C.

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[14] 49 Stat. 2002, 53 Stat. 1185 (U. S. C. Title 46, sec. 1173).

APPENDIX.

Civil Aeronautics Act of 1938 as amended:

SECTION 1. As used in this Act, unless the context otherwise requires—

. . . . . .

(2) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in air transportation: PROVIDED, That the Authority may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

. . . . . .

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

. . . . . .

(19) "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in foreign air transportation.

. . . . . .

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

. . . . . .

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a

place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

* * * * * * * * * * *

SEC. 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation: PROVIDED, That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Authority shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

* * * * * * * * * * *

SEC. 402. (a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Authority authorizing such carrier so to engage: PROVIDED, That if any foreign air carrier is engaged in such transportation on the date of the enactment of this Act, such carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Authority shall pass upon an application for a permit for such transportation if within said one hundred and twenty days such carrier files such application as provided in this section.

* * * * * * * * * * *

SEC. 801. The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate au-

thorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Authority before hearing thereon, and all decisions thereon by the Authority shall be submitted to the President before publication thereof. This section shall not apply to the issuance or denial of any certificate issuable under section 401(e) or any permit issuable under section 402(c) or to the original terms, conditions, or limitations of any such certificate or permit.

* * * * * * * * * * *

SEC. 1006. (a) Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Venue

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

* * * * * * * * * * *